PATENTS AND ANTI-TRUST LAWS



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HIGH official of the Administration was recently reported to have said that the Government would invade the Patent Office with the Sherman Anti-Trust Act. This report was later denied.

The fact remains, however, allowing for the picturesqueness of the simile, that something very like an invasion of what have heretofore been well-established patent rights is now under way in the Department of Justice and in both Houses of Congress.

The Attorney-General and the Patent Laws.

By the decree which the Government procured, in October. 1911, in what was colloquially called the "Electric Lamp cases." the combination was dissolved as a violation of the Sherman Anti-Trust Act, and each Company in the combination which made or licensed the making of incandescent electric lamps, whether under patents or not, was enjoined generally from imposing upon the licensee the fixing of a re-sale price to be observed by the licensee's vendees. The decree further enjoined each Company in the combination from making any arrangement with dealers who might buy from it tantalum filament lamps, tungsten filament lamps, metalized carbon filament lamps, or ordinary carbon filament lamps, whether made under letters patent or otherwise, whereby such dealers were compelled to purchase all their ordinary carbon filament lamps fro , such Company. The decree further enjoined each Company fro.n making or enforcing any agreement, by which the dealers should stipulate to purchase any of the above mentioned lamps from such Company, as a condition to purchasing or being supplied with any other type of lamp from such Company. With great detail, the decree enjoined each Company from discriminating, in price or in terms of sale, against any dealer desiring to purchase tantalum filament lamps, turgeten filament lamps cometallized carbon filament lamps, because of the fact that such dealer purchased ordinary carbon filament lamps from other manufacturors. The decree further enjoined each Company from making any discounts based on the total quantity of two or more types of lamps sold to a dealer, when the result would be to combine or aggregate the discount on both an unpatented lamp and a patented lamp. In broad terms, the decree enjoined each Company in the combination from making any use of its patents in such a manner as should, in any way, tend to control the manufacture or sale of any types of unpatented lamps.

Several weeks later, the Government filed a bill in equity against another group of concerns, whose business consisted in manufacturing and leasing machines, each of which performed one operation in a series that together constituted one branch of the manufacture of a necessity of life. In this bill, the Government prayed that these concerns be dissolved as a combination in violation of the Sherman Anti-Trust Act. Following the analogy of the decree in the "Elec tric Lamp case," the Government prayed that every stipulation in tric Lamp case." the Government prayed that every stipulation in the leases covering such machines, that required the lesses to use such machines in combination with any other in the series of which they were one, should be declared illegal and void; and further, that the concerns which manufactured and leased these machines be enjoined from making any arrangement with the lessees by which such lessees stipulated, as a condition of leasing such machines, that they would lease or be supplied from the manufacturers with any other machines of the same series. The Government further prayed that the manufacturers of these machines be enjoined from making any discount or rebate, by way of reducing the royalties upon the machines which they leased, for the purpose of inducing the lessees to uses their machines exclusively. Although most of the machines to which the Government thus referred embodied numerous inventions covered by patents, the Government expressly claimed that this fact made no difference.

Congress and the Patent Laws.

While the Department of Justice is thus extending the Sherman Anti-Trust Act into what previously was regarded as the domain protected by the Constitution and the patent laws. Congress has been active in suggesting new statutes to accomplish the same purpose.

Senator Gore and Congressman Oldfield each introduced into Coogress last spring a remarkable bill which proposes to amend the patent laws by providing that anybody may petition the Commissioner of Patents for a license to make, use and sell any patented invention, and that thereupon the Commissioner shall hear such hearing, shall make an order requiring the owner of the patent to grant a license to the applicant, in such form and upon such terms as the Commissioner "deems just." The fact that somebody else has already bought a license from the owner of a patent shall not prevent the Commissioner from granting a similar license to any other applicant. The bill further provides that every patent improving an invention covered by a basic patent shall expire upon the date of the expiration of the basic patent.

Senator Kenyon, who was an Assistant Attorney-General of the United States prior to his election as Senator, introduced into the Senate in May, 1911, a bill to supplement the Sherman Anti-Trust Act. This bill provided that if any business, or any portion of any business, constituted a combination in "restraint of trade," every person engaged in such business should forfeit "any and all rights which such person may have to protection under or right to damages for infringement under any patent right held or owned by such person, whether directly from the United States or under purchase, assignment or otherwise; and the right to the free manufacture and use of any and all articles, devices or machines so held under right of patent by the person who shall have violated any of the provisions of this Act, shall thenceforth be opened to all."

Several bills have been introduced by Senator La Follette, Congressman Lenroot and other Congressmen, mostly as suppl

The disposition evidenced by these bills, and the tendency the Department of Justice already noted, are matters worthy of thought-

Early History of the Patent Laws.

Until the most recent times, a liberal view has characterized the American policy toward inventors.

Before the Constitution was adopted, several of the colonies had laws which protected inventors in the exclusive use and profit of their inventions. In 1789, when the Federal Constitution was adopted, the subject was approached in the most generous spirit.

Article 1, Section 8, Sub-division 8 of the Constitution provides that Congress shall have power "to promote the progress of solence and useful arts, by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries."

Almost every other clause of the Constitution was the subject of

Almost every other clause of the Constitution was the subject of more or less disagreement and debate. To this clause, however, was accorded the almost unique distinction of universal approval. Neither in the debates in the Constitutional Convention, nor in the months of pamphleteering and public discussion which followed the Convention and preceded the adoption of the Constitution by the several States, was the policy of this clause here challenged.

Following the reccommendations of Alexander Hamilton, in his famous Report on Manufactures, the first patent laws of the United States were enacted in 1790. During the succeeding forty-six years 9.957 patents were issued. Under the impulse of this growth, new stanues, placing the patent system upon a more substantial basis, were then enacted.

Mr. Justice Story, writing about this time, was well within the mark when he stated:

Patents for inventions are now treated as a just reward to ingen.ous men, and as highly beneuclai to the public, not only by holding out considerable encouragements to gentus and talents and enterprise, but as unimately securing to the whole community great advantages from the free communication of secrets and processes and machinery; which may be most important to all the great interests of society—to agriculture, to commerce, and to manufactures, as well as to the cause of science and art. In America this liberal view of the subject has always been taken, and indeed it is a natural if not necessary result from the very language and intent of the power given to Congress by the Constitution on this subject."

Subsequent revision of the patent laws brought the system to such a degree of perfection that the commissioners of foreign nations who attended the Centennial Exhibition in Philadelphia in 1876, struck with the American superiority in machinery and mechanical tools, attributed this superiority to the fostering effect of the American patent system, and advised their governments to take steps to create or modify their patent laws to conform to ours. What most impressed these foreign visitors, judging from their reports to the nations whom they represented, was the stimulus which our patent laws afforded to inventions by mechanics working in the factories and workshops throughout the country.

Prosperity Under the Patent System.

In 1878 the Committee of the United States Senate on Patents reported that the patent system had been the foremost agent in promoting the progress of the useful arts in the United States. The

"No change should be made in the patent law to weaken the inducement which, in its ordinary and normal operation in the common transactions of business, it offers to those who will successfully invent, and to those who, by perseverance and expenditure, will perfect the inventions and the machines in which they are embodied, and push their introduction so far as to put the public in possession of perfectly working machines or a perfectly finished product."

The benefits which the entire community derived from the patent system vastly exceeded, in the opinion of the committee, "the loss from changes which should substantially impair the protection it gives to the exclusive right intended to be enjoyed by the inventor

What the United States owes to its patent system can hardly be estimated.

Figures showing the development of a few manufacturing industries afford a slight notion of what the total benefit of the patent system has been to the welfare of the United States. In 1850 the amount of capital engaged in the manufacture of agricultural implements was \$3,564,202. In 1905 it had increased to \$196,740,700 and afforded employment to 47,394 wage earners. The value of the products of this industry meanwhile had increased from \$20,831,804 to \$112,007,344. In 1800 the capital engaged in the manufacture of sewing machines amounted to \$1,494,450. In 1905 the amount of capital in this industry amounted to \$26,696,294. The value of the products of this industry amounted to \$26,696,294. The value of the products of this industry meanwhile had risen from \$4,403,206 to \$20,859,870. Practically every invention that has made possible the improvement of electrical apparatus has depended for its existence and development upon the patent system. In 1880 there were only 76 concerns in this industry and the capital employed amounted to \$1,500,753. In 1905 there were 784 establishments, and the capital invested amounted to \$174,086,025. The value of the product meanishing the same product of \$10,600,753. In 1905 there were 80 establishments employing a capital of \$16,641,892 and producing a product of \$10,640,496. Other industries dependent upon patents showed even more striking results. The paper and printing trades produced in 1905 an output valued at \$596,572,350. Manufactures of metals other than from and steel amounted in the same year to \$442,912,899. Textiles, which are peculiarly the product of patented articles, aggregated in 1905 the enormous total of \$1,397,009,940. In 1880 the capital employed in the manufacture of boots and shoes was \$42,994,028, and the value of the product was \$106,080,354. In 1905 the amount of capital in the industry was \$122,526,093, and the value of the output was \$320,107,458. In 1890 there were five concerns in the United States manufacturing photographic apparatus, having a capital of \$5,731,462 and an output of \$9,543,960. During the five years from 1900 to 1905 the number of manufactures of automobiles increased from \$5,768,857 to \$23,083,860, the number of wage increased from \$1,720,083,536. The aggregate value of all the refine ments was \$3,564,202. In 1905 it had increased to \$196,740,700 and afforded employment to 47,394 wage earners. The value of the

ventions encouraged by the patent system. The tremendous wealth and prosperity indicated by these figures affords some slight notion of the debt which the United States owes to its patent system.

Patent Laws the Cause of Improvements.

The century just elapsed saw the invention of the first steamboat, the first practical steam rotary printing press, the first locomotive, the first parting machine, the first trailread, the first typewriter, the first telegraph apparatus, the first electric light, the first pneumatic tire, the first sewing machine, the first photographic camera, the first ocean telegraph cable, the first shoe-sewing machine, the first sanitary plumbing, the first harvester, the first automatic railway equipment, the first application of electricity to power and transportation, the first telephone, the first phonograph, the first rotary steam turbine and the first aeroplane.

None of these great instruments of commerce, in the form in which we know them to-day, were produced in the pioneer inventions which bear their name. A multitude of less interesting but in the aggregate more important inventions had to be made in order that the great ideas embodied in the initial inventions might become workable. The century just elapsed saw the invention of the first steamboat.

workable.

With attention fastened upon the brilliant, imaginative effort represented by those pioneer inventions sight has been lost of the greater effort involved in the painful, laborious experimentation which has produced the numberless subsequent improvements required to improve the pioneer inventions in order to adapt them to practical and commercial use. For this reason pioneer inventors like Fulton, Stephenson, Howe and Morse are ranked in popular esteem with great discoverers like Columbus, Cortes and La Salle. But the hundreds of toiling inventors who followed these great pioneers and did the less celebrated task, but no less necessary and frequently more laborious work of devising ways and means by which the original invention might accomplish its great purpose are forgotten, like the humble settlers in the train of the great discoverers who opened and cultivated the country and by generations of patient and uncelebrated toil have brought about its present development.

whatever may have been the cause of the great pioneer inventions, the stimulus that produced the thousands of improvements that have adapted them to practical and commercial use has been

the patent system.

The Committee of the United States Senate on Patents in 1878, reviewing the progress of invention in England and in the United

"The steam engine, invented and improved by Watt, the steamboatbelonging to this country, the locomotive engine invented by Stephenson
and improved by his son, were created under the direct and personal stimulus of the patent law, and patented as soon as invented. The labor and expense of Watt and Boulton in perfecting the engine were so great that,
when it seemed likely to fall to the ground after Watt had spent all his means
and six years of the life of his patent, Pastiamenj extended it long before tis
expiration in order to induce them to persevere. Watt thought in 1835
that no further improvement could be added, but since that time the machine
has been the subject of innumerable patents, and its efficiency increased
between four and five fold, while all the gain he made over the old atmospheric engine of Newcomen was to increase the power rather less than
fourfold. Since Stephenson's time the locomotive has been made the subject
of perhaps as many patented improvements, few great in themselves, but
in the aggregate increasing its capacity as much as that of the stationary
engine has been increased."

The committee announced the principle, which the Constitu-tional Convention and the first Federal Congress had acted upon-which Alexander Hamilton had explained and which universal ex-

"The protection which the patent gives a patent owner in the results attained induces him, and is all that will induce him, to expend the time and the money—often several hundred thousand dollars upon a single machine—in perfecting i.e. invention, embodying it in a practically useful machine, and introducing it to public use. The committee are, therefore, convinced that the framers of the Constitution were wise in their judgment when, in intrusting to Congress the power to promote science and useful aris, they gave them only one means for doing it, namely, securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. No change should be made in the patent law to waken the inducement which, in its ordinary and normal operation in the commen transactions of business, it offers to those who will successfully invent, and to those who, by perseverance and expenditure, will perfect inventions and the machines in which they are embodied, and push their introduction so as to put the public in possession of perfectly working machines or a perfectly finished product."

The total number of patents issued up to December 12, 1911, was 1,011,894. In 1909 there were 65,839 applications for patents and 37,421 new patents were issued. During that year the fees received by the Patent Office in the course of its business amounted to \$2,042,823.14, which showed a considerable excess of receipts over expenses. This excess was turned into the Treasury of the United States, so that on January 1, 1910, the total balance to the credit of the Patent Office created out of the excess of receipts over disbursements for a long period of years amounted to \$6,998,227.64.

The numberless hours of labor, the millions of dollars of expenditure, the countless failures and all the laborious and costly experimentation represented by these figures have been and must always continue to be essential to every step of economic and social progress. The only compensation to those who bear this tremendous burden for the benefit of the race is that afforded by the patent system. For this incalculable service the Constitution of the United States merely provides that the inventor who, at his own risk and by his own labor and expenditure, has finally increased human knowledge and comfort, may "for limited times" have the "exclusive right" to his own creation. Congress have since fixed this "limited time" at only seventeen years.

Judge Taft's Definition of Patent Rights.

Just what the inventor gets under the Constitution of the United States and the patent laws was nowhere better described than in 1898, in the language of the Circuit Court of Appeals of the Sixth Cirouit, in which Judge Taft, now President of the United States, and Judge Lurton, now an Associate Justice of the Supreme Court of

"The essence of the monopoly conferred by the grant of letters patent is the exclusive right to use the invention or discovery described in the patent. This exclusive right of use is a true and absolute monopoly, and is granted in derogation of the common right, and this right to monopolize the use of the invention or discovery is the substantial property right conferred by law, and which the public is under obliquation to respect and protect. The right to make and use, or sell, are completely severable rights, and involves the right to confer on others such qualified privilege, whether of making, of selling to others, or of using, as he sees fit, whether within specified limits, or under limitations of quantity or numbers or restricted use."

Apart from the interest which this definition of the patent right derives, from the high station now occupied by the Judges that announced it, this decision has the additional authority of having been repeatedly cited with approval of the Supreme Court of the United States.

From this definition of the rights of the owner of a patent, two principles result, which, time and again, have been laid down by the

First: The owner of a patent may impose restrictions upon the

use of the patent, and the manufacture and sale of the patented article by the licensee, and such restrictions, if part of an express agreement between the owner and such licensee, may be enforced by the owner against such licensee. Second: The owner of a patent may impose restrictions upon the

Second: The owner of a patent may impose restrictions upon the use and resale of the patented article, by the party to whom such article is sold, and such restrictions, if made known to such party, may be enforced against such party by the owner of the patent, even though no express agreement exists between them.

Technical as these principles sound, their importance in the American patent system, as the chief encouragement to inventions which have enormously increased American wealth and American prosperity, chititles them to careful consideration.

Several examples may be cited of restrictions upon the use of a patent, and upon the manufacture and sale of the patented article by the licensee, which, according to decisions of the Circuit Court of Appeals of several circuits, may be imposed and enforced by the owner of a patent; provided such restrictions be made the subject of an express agreement between the owner and such licensee.

The owner of a patent for rubber tired wheels granted to various concerns licenses under these patents. The licensee agreement established uniform prices and fixed the percentage of output which could be made and sold by each licensee and provided that a Commissioner named by the owner of the patent should supervise the business of all the licensees, and receive a specified portion of the royalties and distribute such fund among the licensees according to their quota of trade. The Circuit Court of Appeals of the Seventh Circuit, sitting in Chicago, held that this arrangement was valid, and did not violate the Sherman Anti-Trust Act.

The owner of patents covering harvesting stackers granted licenses under these patents to several concerns. By the terms of this grant the licensees agreed to maintain a fixed price, and to pay the owner a fixed royalty. The Circuit Court of Appeals of the Seventh Circuit, sitting in Chicago, held that this arrangement was lawful and not inconsistent with the Sherman Anti-Trust Act.

The owner of certain patents covering raisin-seeding machines assig

"Congress having created the patent law, had the right to repeal or modify it, in whole or in part, directly or by necessary implication. The Sherman Law contains no reference to the patent law. Each was passed under a separate and distinct constitutional grant of power; each was passed professedly to advantage the public; the necessary implication is not that one lots was taken away from the patent law; the necessary implication is that patented articles, unless or until they are released by the owner of the patent from the dominion of his monopoly, are not articles of trade or commerce among the several states."

the patent from the dominion of his monopoly, are not articles of trade or commerce among the several states."

The leading authority for the proposition that the owner of a patent may impose restrictions upon the use and resale of the patented article, by the party to whom such article is sold, and that such restrictions, if disclosed to such party, may be enforced against him by the owner of the patent, even though no express agreement exists between them, is the case above referred to, decided by the Circuit Court of Appeals for the Sixth Circuit, in which Judge Taft and Judge Lurton both participated and concurred, and which has several times been approvingly cited by the Supreme Court of the United States and often quotted as authority by other Federal courts.

This was a case in which a manufacturer owned several patents overing machines for fastening buttons to shoes with metallic fasteners. Every machine bore a conspicuous metal plate on which was expressed a restriction to the effect that the machine was sold and purchased to use only with the fasteners made by the manufacturer, and that title to the machines should revert to the manufacturer upon any violation of this restriction. Judge Taft and Judge Lurton, as has already been shown, both held this restriction to be valid and enforceable. What to-day is most interesting in their decision is the conclusive manner in which they answered the suggestion that such a restriction might extend the patent monopoly to articles not included under the patent. Since the present attitude of the Department of Justice and the proposed legislation above described have been inspired solely by this suggestion it is particularly interesting to see how completely Judge Taft and Judge Lurton demolished it sixteen years ago.

Judge Taft Disproves Monopoly Charge. Judge Taft and Judge Lurton showed, with logic no less irre-futable to-day than it was when the decision was first delivered, that any so-called monopoly in unpatented articles which might result from such an arrangement was a legitimate part of the patent right:

"If the patentee chooses to reserve to himself the exclusive use of his device, and the invention be of a wide character, and so radical as to enable him to make and sell an unpatentable product cheaper than any other competitor, a practical monopoly of the market for that article will result; and yet no one could say that a monopoly thus secured was illegitimate, or obnoxious to public policy."

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To illustrate: Let it be supposed that the patents owned by this complainant were of so wide a character as to cheapen the process of manufacturing shoes, and to drive from competition all other modes of manufacturing shoes, and to drive from competition all other modes of manufacturing shoes, and to drive from competition all other modes of manufacturing in the manufacture of shoes. If content to undersell all others, they could engross the market for shoes, to the extent of their capacity to supply the demand during the life of their patents, or so long as their invention was not superseded by subsequent inventions still further cheapening the cost of manufacture. The monopoly thus secured would be the legitimate consequence of the mentorious character of their intention. Yet just such monopolies may result whenever a new and surprising advance is made in terms after the monopoly could endure so long only as shoes were supplied at a less price than had prendied before the invention.

"Now if the patenties, by retaining to themselves the eaclusive use of their invention, are able, legitimately and lawfully, to acquire a monopoly of the manufacture of shoes, and destroy the shoe market for those who before had shared it, why may they not, by a system of restricted hoeness, permit others to use their devices on condition that only some minor part of the shoe—the pegs, the tips, the thread, or the buttons, or the buttons, or the button fasteners—shall be bought from them? If these concessions were such as to enable others to compete, though their use of the mechanism was restricted by the terms of the ilense, who could justify complain if the inventers, content with a monopoly of the market for the article named in the ileesse, surrendered the opportunity for a monopoly of the manufacture of the complete shoe?"

Judge Taft and Judge Lurt

Judge Taft and Judge Lurton thus convincingly proved that such a result, far from offending against public policy, was a positive benefit. For the patent owner could accomplish this result only as he could "make and sell an unpatentable product cheaper than any other competitor" and that "the great consuming public would be benefited rather than injured, for the monopoly could endure so long only as shoes were supplied at a less price than had prevailed before the invention." Applying these principles to the staple-fasteners involved in the case before them they drove home their logic in these words: their logic in these words:

"This method of licensing their mechanism may or may not result in the engrossment of the market for staples. So long as their invention controls the market for button-fastening appliances, and to the extent that their machines shall supersede other modes of clinching staples, just so long will be they be enabled to control the market for staples. Their monopoly in an unpatented article will depend upon the merit of their patented device, and the extent to which other clinching devices are superseded by it. In the last an alysis the invention destroyed the demand for sizes and shapes of staples not adapted to use with the machine of complainant and the monopoly of the use awarded by the patents destroyed the market for staples fitted for use in complainant's machines. The monopoly in the use of complainant's invention and is therefore a legitimate result of the patenter's control over the use of his invention by others. Depending, as such a monopoly would, upon the merits of the invention to which it is a mere incident, it is neither obnoxious to public policy, nor an illegal restraint of trade."

Common sense, no less than the authority of the many courts which have quoted this decision with approval, supports the reasoning of Judge Taft and Judge Lurton. The Circuit Court of Appeals of the Second Circuit, sitting in New York, has indicated that restrictions similar to those described by Judge Taft and Judge Lurton should be enforced only when they required users of the machine to purchase from the manufacturer articles particularly adapted to the machine, as distinguished from articles like paper and ink and other common supplies, made without particularity and sold in the ordinary market. This distinction, however, should not disturb the principle which Judge Taft and Judge Lurton in such masterly fashion annunciated. This principle has time and again been accepted and elaborated by the courts. The common sense underlying has been succinctly stated by a Massachusetts Judge as follows:

"The owner might stipulate for a price or royalty to be received entirely in a stated sum of money or in part in the profits that he would make in furnishings fasteners at an agreed price for use in the machine. The purchaser who could not obtain the machine at all except upon such terms as the owner should choose to impose, might as well agree to pay for it in that way as in any other."

This right of the patent-owner to enforce restrictions regarding the manner of use and terms of sale is not unreasonable. Most basic atents are not ready for commercial exploitation until the lapse of six or seven years after they are issued. In this the patented article differs from the copyrighted book, which is complete and ready for sale as soon as the copyright is issued. Yet the term of the patent is seventeen years, as against twenty-eight years with possibly fourteen years more in the case of the copyright. Since the productive period of a patent is really so short, the importance of preserving, in full integrity, the right to enforce these restrictions regarding use and sale is all the greater.

The Supreme Court on Patent Rights.

The Department of Justice now contends that by reason of the Sherman Anti-Trust Act the only restrictions which the patent-owner may impose upon the manufacture and sale of the patented article by his licensee are such restrictions as he might impose if the article were not patented; and further that by reason of the Sherman Anti-Trust Act the owner of a patent can no more impose restrictions upon the use and re-sale of the patented article than he might if the article were not covered by patent.

From the standpoint of public policy, the only conceivable argument in favor of this attitude is that possibly competition may thereby be compelled between manufacturers and dealers in different patented articles or in articles manufactured under the same patent. This argument was answered by the Circuit Court of Appeals of the

"Over and above an absolute monopoly, created by law (i. e., by the patent laws) how can there be a further and an unlawful monopoly in the same thing? If plaintiff were the sole maker of Grant tires, how could plaintiff's control of prices and output injure the people, deprive them of something to which they have a right? Is a greater injury or deprivation inflicted if plaintiff authorizes a combination or pool to do what plaintiff authorizes a combination or pool to do what plaintiff and dedirectly? To say yes means that substance is disregarded, that mere words confer upon the people some sort of a right or interest counter to the monopoly, when by the terms of the bargain the people agreed to claim none until Grant's deed to them shall have matured."

More succinctly and absolutely conclusively, this argument was disposed of by Mr. Justice McKenna, speaking for the Supreme Court of the United States in the "Paper Bag case," hereinafter quoted, when he declared:

"As to the suggestion that competitors are excluded from the use of the new patent, we answer that exclusion may be said to have been the very essence of the right conferred by the patent."

Perhaps the contrary notion might never have been thought of, except for the decisions of the Supreme Court of the United States in the "Copyright case," in 1908, and in the "Proprietary Medicine

In the "Copyright case," the Supreme Court held that a book publisher could not prevent a book-seller from selling a copyright novel for less than a stipulated price, merely by printing in the book a notice that "no dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright." In that case, however, the Supreme Court was careful to state that "there are such wide differences between the right of multiplying and vending copies of a production protected by the copyright statute and the rights secured to an inventor under the patent statutes, that the cases which relate to the one subject are not altogether controlling as to the other," The Supreme Court expressly declared that nothing in its decision should be treated as an indication of its view "as to what woul I be the rights of parties in circumstances similar to the present case under the patent laws." In the "Proprietary Medicine case," the Supreme Court held that the arrangement was unenforceable, by which the manufacturer of the proprietary medicine sold proprietary medicines to such jobbers only as agreed with the manufacturer to maintain certain fixed prices for all sales by all wholesale and retail dealers, whether purchasers or subpurchasers. The Supreme Court, in this case also, was careful to state that rights which the pat at laws might secure were in no way involved or determined by this decision. No warrant, therefore, for abridging the rights of a patent-owner is afforded by these decisions.

From what has preceded it is apparent that the Supreme Court of the United States has assumed an interesting attitude regarding the relation of the Sherman Anti-Trust Act to the patent laws.

In 1802, in a case, involving the validity of contracts relating to the manufacture and sale of harrows. Mr. Justice Peckham, speaking for the Court, began the discussion by saving: "The first important and most material fact in considering this question is that the agreements concerned articles protected by letters patent of the Government of the United States." The owner of the patent, Mr. Justice Peckham continued, was "the owner of a monopoly recognized by the Constitution and by the statutes of Congress. An owner of a patent has the right to sell it or to keep it; to manufacture the article himself, or to license others to manufacture it; to sell such article himself or to authorize others to sell it." Coming to the question as to whether the contracts in the case were illegal under the Sherman "Trust Act, Mr. Justice Peckham said:

The general rule is absolute freedom in the use or sale of rights und it patent laws of the United States. The voltect of these laws is the patent laws of the United States. The voltect of these laws is the patent laws of the rule is, with few exception in their very nature illegal with research to his kind of property, immused by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upfeld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.

"That statute it, e. the Sherman Anti-Trust Acti clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee of illenace of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act, we have no doubt, was never contemplated by its framers."

Nothing which the Supreme Court of the United States has since said modifies its view above expressed. In 1907, the Supreme Court quoted with approval its former opinion, and added: "It is unnecessary to consider how far a stipulation in a contract between the owner of a patent right and the purchaser from him of a machine manufactured under that right, that it should be used only in a certain way, will sustain an action in favor of the vendor against the purchaser, in case of a breach of that stipulation." In 1908, the Suprame Court elaborately discussed the rights of an owner of a patent, in connection with a case relating to a patent for making paper bags. The inventor in that case was shown to have taken out the patent, and to have refrained from making any use of the invention during the period of the patent. Counsel urged upon the Supreme Court that an inventor was in the position of a quasi trustee for the public, and under a sort of moral obligation to see that the public acquires the right to the free use of the invention, as soon as is conveniently possible. The Supreme Court declared its complete dissent from this notion. Mr. Justice McKenna speaking for the Court said:

"The inventor is one who has discovered something of value. It is his

"The inventor is one who has discovered something of value. It is his absolute property. He may withhold a knowledge of it from the public, and he may insist upon all the advantages and benefits which the statute promises to him who discloses to the public his invention.

"As to the suggestion that competitors were excluded from the use of the new patent, we answer that exclusion may be said to have been the very essence of the right conferred by the patent, as it is the privilege of any owner of property to use or not to use it, without question of motive."

National Dangers Threatened By Curtailing Patent Rights.

Perhaps the disrespect of patent rights, implied in the contentions of the Department of Justice and the changes in the patent laws proposed by Congress, would never have arisen had not the mistaken belief become general that patents covering improvements deserve less encouragement and protection than patents covering pioneer inventions. For the future of American industries and the welfare of the country, it is hoped that a correct understanding of the facts—a few of which have here been touched upon—may speedily correct this popular error.

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Any proposal to restrict rights, hitherto deemed the fair due of the successful inventor, raises more than a legal question. It raises the moral issue, whether the inventor who has devoted his life to increasing human information and welfare, upon the assurance of laws and well settled decisions that have long defined the rewards for his labor and risk, should now be deprived of the rewards so solemnly promised to him, which at best are such inadequate compensation for the service he has rendered to the community.

Any proposal to abridge the rewards of invention raises another question, involving the welfare and very existence of the entire community. With our expanding population and the increasing requirements and cost of living compelled by our advancing civilization, we cannot continue to maintain ourselves, much less to improve our condition, except by more intensive cultivation of the arts already discovered. Leading inventors assure us, and common observation and experience support their view, that during the next century the new fields which invention may open must be fewer and more restricted than those opened by the brilliant series of pioneer inventions during the century just passed. Future invention, therefore, must be accomplished by harder effort, with shorter degrees of progress, and against greater obstacles, than have previously been met. In education this fact has been plainly seen. Technical schools to equip future generations for the harder struggle for existence awaiting mankind are everywhere being established. Philanthropy also has a clear vision of the future. Foundations to discover methods of bettering human conditions, to increase the efficiency of humanitarian institutions and to help the race to cope with increasing difficulties of existence, are being endowed on every hand. Until recently, the only agency at work in the

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